



## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648-XB797]

#### **Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys Offshore from New York to Massachusetts**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; issuance of Renewal incidental harassment authorization (IHA).

**SUMMARY:** In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that NMFS has issued a Renewal incidental harassment authorization (IHA) to Ørsted to incidentally harass marine mammals incidental to marine site characterization surveys offshore from New York to Massachusetts.

**DATES:** This Renewal IHA is valid from the date of issuance through September 24, 2022.

**FOR FURTHER INFORMATION CONTACT:** Carter Esch, Office of Protected Resources, NMFS, (301) 427-8421. Electronic copies of the original application, renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

*<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>*. In case of problems accessing these documents, please call the contact listed above.

**SUPPLEMENTARY INFORMATION:**

## Background

The Marine Mammal Protection Act (MMPA) prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal IHA for this activity, and requested public comment on a potential renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time one-

year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a renewal would allow for completion of the activities beyond that described in the **DATES** section of the initial IHA issuance, provided all of the following conditions are met:

(1) A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).

(2) The request for renewal must include the following:

- An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).
- A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

(3) Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is

provided to allow for any additional comments on the proposed Renewal IHA. A

description of the renewal process may be found on our website at:

*[www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals](http://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals)*.

### **History of Request**

On September 25, 2020, NMFS issued an IHA to Ørsted to take marine mammals incidental to marine site characterization survey activities offshore from New York to Massachusetts in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS-A 0486/0517, OCS-A 0487, and OCS-A 0500) (Lease Areas) and along potential submarine export cable routes (ECRs) to landfall locations from New York to Massachusetts (85 FR 63508, October 8, 2020), effective from September 25, 2020 through September 24, 2021. Work under the initial IHA was completed, and on July 8, 2021, NMFS received an application for the renewal of that initial IHA to cover a second year of identical work. Ørsted later communicated that marine site characterization surveys under the Renewal IHA would not begin until 2022. As described in the application for renewal, the activities for which incidental take is requested are identical to those covered by the initial authorization. As required, the applicant also provided a monitoring report (available at *<https://www.fisheries.noaa.gov/action/incidental-take-authorization-orsted-wind-power-north-america-llc-site-characterization>*) which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted. The notice of the proposed Renewal IHA was published on January 6, 2022 (87 FR 756).

### **Description of the Specified Activities and Anticipated Impacts**

Ørsted plans to conduct a second year of marine site characterization surveys, using high-resolution geophysical (HRG) equipment, within the Lease Areas – located approximately 14 miles (mi) (22 kilometers (km)) south of Martha’s Vineyard, Massachusetts at its closest point – and proposed ECRs from the Lease Areas to potential shore landing locations for submarine cables associated with offshore wind development along the coast from New York to Massachusetts. The purpose of the marine site characterization surveys is to support site assessment, siting, and engineering design of offshore project facilities, including wind turbine generators (WTGs), offshore substation(s), and submarine cables within the Lease and proposed ECR Areas. The activities covered under the initial IHA have been completed. Ørsted requested a renewal of the initial IHA issued by NMFS in September 2020 on the basis that they plan to conduct up to another year of identical activities in the same area as described in the Detailed Description of the Specified Activities section of the **Federal Register** notice for the initial proposed IHA (85 FR 48179, August 10, 2020), which can be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>.

In their 2020 IHA application, Ørsted estimated it would conduct surveys at a rate of 70 kilometers (km) per survey day. Ørsted defined a survey day as a 24-hour activity day, which could be the sum of multiple partial surveys if less than 70 km is surveyed in 24 hours. Based on the planned 24-hour operations, the survey activities for all survey areas would require 1,302 survey days if one vessel were surveying continuously. However, Ørsted proposed to use an estimated five vessels simultaneously from June 1 through December 31, with a maximum of no more than nine vessels. Therefore, Ørsted planned to complete all survey effort in one year, prior to the expiration of the initial IHA on September 24, 2021; all of the work addressed under the initial IHA was completed prior to the initial IHA expiration date. The Renewal IHA will authorize take, by Level B

harassment only (in the form of behavioral disturbance), of 15 species/stocks of marine mammals for a second year of identical survey activities to be completed no later than September 24, 2022, in the same area, using survey methods identical to those described in the initial IHA application; therefore, the anticipated effects on marine mammals and the affected stocks also remain the same. The amount of take, by Level B harassment, requested for the Renewal IHA is identical to that authorized in the initial IHA. All active acoustic sources, mitigation, and monitoring measures are exactly as described in the **Federal Register** notices of the issued initial IHA (85 FR 63508, October 8, 2020; 85 FR 71058, November 6, 2020).

#### *Detailed Description of the Activity*

A detailed description of the marine site characterization survey activities for which incidental take is planned may be found in the **Federal Register** notice of the proposed IHA (85 FR 48179; August 10, 2020) for the initial authorization. As described above, Ørsted completed the survey activities analyzed for the initial IHA by the date the IHA expired (September 24, 2021). The surveys Ørsted plans to conduct under this renewal will be identical to those described in the initial IHA. The location and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices.

#### *Description of Marine Mammals*

A description of the marine mammals in the area of the activities for which take is authorized, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** notice of the proposed IHA for the initial authorization (85 FR 48179; August 10, 2020). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports (SARs), Technical Reports (*e.g.*, Pace 2021), information on relevant Unusual Mortality Events (UMEs), and other scientific literature, and determined that neither this nor any other information alters which species

or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activity contained in the supporting documents for the initial IHA.

The draft 2021 SARs, available online at:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports>) state that estimated abundance has increased for the Western North Atlantic stocks of common dolphins (from 172,825 (CV = 0.21) to 172,974 (CV = 0.21)), and gray seals (from 27,131 (CV = 0.19) to 27,300 (CV = 0.22)). Abundance estimates have decreased for the following species: the Western North Atlantic stocks of fin whales (from 7,418 (CV = 0.25) to 6,802 (CV = 0.24)), Risso's dolphins (from 35,293 (CV = 0.19) to 35,215 (CV = 0.19)), harbor seals (from 75,834 (CV = 0.15) to 61,336 (CV = 0.22)), and the Canadian East coast stock of minke whales (from 24,202 (CV = 0.3) to 21,968 (CV=0.31)). The abundance estimate for the Western North Atlantic stock of North Atlantic right whales has also been updated in the draft 2021 SAR, which states that right whale abundance has decreased from 428 to 368 (95 percent CI 356-378) individuals (Hayes *et al.*, 2021).

NMFS has determined that neither the updated abundance information presented above nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activity contained in the supporting documents for the initial IHA.

#### *Potential Effects on Marine Mammals and their Habitat*

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is authorized may be found in the **Federal Register** notices of the proposed (85 FR 48179; August 10, 2020) and final (85 FR 63508, October 8, 2020; 85 FR 71058, November 6, 2020) initial IHAs. NMFS has reviewed the most recent information relevant to this Renewal IHA (monitoring data

from the initial IHA, recent draft SARs, Technical Reports (*e.g.*, Pace 2021), information on relevant Unusual Mortality Events, and other scientific literature and data), and determined that there is no new information that affects our initial analysis of impacts on marine mammals and their habitat.

### *Estimated Take*

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the Notices of the proposed (85 FR 48179; August 10, 2020) and final (85 FR 63508; October 8, 2020) IHAs for the initial authorization. Specifically, the acoustic source types, source levels, and days of operation applicable to this authorization remain unchanged from the previously issued initial IHA. Similarly, the methodology for calculating take, and thus stocks taken, methods of take and type of take (*i.e.*, Level B harassment in the form of behavioral disturbance) remain unchanged from the initial IHA, as do the number of takes for each species or stock, which are indicated below in Table 2.

**Table 2. Authorized Take by Level B Harassment**

	Species	Abundance Estimate <sup>1</sup>	Authorized Take	% Population
North Atlantic right whale	<i>Eubalaena glacialis</i>	368	37	10.05
Humpback whale	<i>Megaptera novaeangliae</i>	1,396	21	1.50
Fin whale	<i>Balaenoptera physalus</i>	6,802	36	0.53
Sei whale	<i>Balaenoptera borealis</i>	6,292	2	0.0
Minke whale	<i>Balaenoptera acutorostrata</i>	21,968	13	0.06
Sperm whale	<i>Physeter macrocephalus</i>	4,349	3	0.07
Long-finned pilot whale	<i>Globicephala melas</i>	39,215	69	0.18
Bottlenose dolphin (W.N.A. offshore)	<i>Tursiops truncatus</i>	62,851	419	0.67
Common dolphin	<i>Delphinus delphis</i>	172,974	2,211	1.28
Atlantic white-sided dolphin	<i>Lagenorhynchus acutus</i>	93,233	418	0.45
Atlantic spotted dolphin	<i>Stenella frontalis</i>	35,215	7	0.02
Risso's dolphin	<i>Grampus griseus</i>	35,493	30	0.08
Harbor porpoise	<i>Phocoena phocoena</i>	95,543	916	0.96
Harbor seal	<i>Phoca vitulina</i>	61,336	215	0.36
Gray seal	<i>Halichoerus grypus</i>	27,300	215	0.79



W.N.A. = Western North Atlantic.

<sup>1</sup> Abundance estimates have been updated from the initial IHA (85 FR 63508; October 8, 2020) using the 2021 Draft SARs (Hayes *et al.*, 2021).

### *Description of Mitigation, Monitoring and Reporting Measures*

The mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA (85 FR 63508, October 8, 2020), and the discussion of the least practicable adverse impact included in that document and the notice of the proposed Renewal IHA remains applicable. All mitigation, monitoring, and reporting measures in the initial IHA are carried over to this Renewal IHA and summarized below:

- *Ramp-up*: a ramp-up procedure must be used for HRG equipment capable of adjusting energy levels at the start or re-start of survey activities.
- *Protected Species Observers (PSOs)*: A minimum of one NMFS-approved PSO must be on duty and conducting visual observations at all times during daylight hours (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset), and two active duty PSOs must conduct observations 30 minutes prior to and during nighttime ramp-ups and operation of HRG equipment.
- *Exclusion Zones (EZ)*: Marine mammal EZs must be established around the HRG survey equipment and monitored by PSOs during marine site characterization surveys as follows: A 500-m EZ for North Atlantic right whales during use of impulsive acoustic sources (*e.g.*, boomers and/or sparkers) and non-impulsive, non-parametric sub-bottom profilers (*e.g.*, Chirps); and a 100-m EZ for all other marine mammals during use of impulsive acoustic sources (*e.g.*, boomers and/or sparkers).
- *Pre-Operation Clearance Protocols*: Ørsted must implement a 30-minute pre-start clearance period of the specified clearance zones (CZs; 500 m for North Atlantic right whales, 100 m for all other marine mammals) prior to the initiation of ramp-up of

boomers, sparkers, and non-impulsive, non-parametric sub-bottom profilers (*e.g.*, Chirps). During this period, the CZs must be monitored by PSOs using the appropriate visual technology. Ramp-up must not be initiated if any marine mammal(s) is within its respective CZ. If a marine mammal is observed within its respective CZ during the pre-start clearance period, ramp-up must not begin until the animal(s) has been observed exiting its respective CZ, or until an additional period has elapsed with no further sighting (*i.e.*, 15 minutes for small odontocetes and seals, and 30 minutes for all other species). Pre-clearance and ramp-up, but not shutdown, will be required when using only non-impulsive, non-parametric sub-bottom profilers (*e.g.*, Chirps), except in the case that a North Atlantic right whale is observed within the 500-m CZ.

- *Shutdown of HRG Equipment:* If an HRG source is active and a marine mammal is observed entering or within a relevant EZ (as described above), an immediate shutdown of the HRG survey equipment is required. Note that this shutdown requirement is waived for certain genera of small delphinids. If a species for which authorization has not been granted, or, a species for which authorization has been granted but the authorized number of takes has been met, approaches or is observed within the Level B harassment zone (54 m, non-impulsive; 141 m impulsive), shutdown must occur.

- *Vessel strike avoidance measures:* Vessel strike avoidance measures include, but are not limited to, vessel separation distances for large whales (500 m North Atlantic right whales; 100 m other large whales; 50 m other cetaceans and pinnipeds), restricted vessel speeds, and operational maneuvers.

- *Seasonal Operating Requirements:* Ørsted must limit to three the number of survey vessels that operate concurrently from January 1 through May 31 within the Lease Areas (OSC-A 0486/0517, OCS-A 0487, and OCS-A 500) and ECR Area north of the Lease Areas up to, but not including, coastal and bay waters. Ørsted must operate either a single vessel, two vessels concurrently, or, for short periods, no more than three

survey vessels concurrently in the areas described above from January 1 through May 31. This seasonal restriction will help to reduce both the number and intensity of North Atlantic right whale takes by Level B harassment.

- *Reporting:* Ørsted must submit a final technical report within 90 days following completion of the surveys. In the event that Ørsted personnel discover an injured or dead marine mammal, Ørsted must report the incident to NMFS Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov* and *itp.esch@noaa.gov*) and to the New England/Mid-Atlantic Regional Stranding Coordinator through the NOAA Fisheries Marine Mammal and Sea Turtle Stranding and Entanglement Hotline (866-755-6622) as soon as feasible. In the event of a ship strike of a marine mammal by any vessel involved in the activities covered by the authorization, Ørsted must report the incident immediately to NMFS OPR and to the New England/Mid-Atlantic Regional Stranding Coordinator through the NOAA Fisheries Marine Mammal and Sea Turtle Stranding and Entanglement Hotline. Ørsted must immediately cease all project activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the proposed Renewal IHA.

### **Comments and Responses**

A notice of NMFS' proposal to issue a Renewal IHA to Ørsted was published in the Federal Register on January 6, 2022 (87 FR 756). That notice either described, or referenced descriptions of, Ørsted's activity, the marine mammal species that may be affected by the activity, anticipated effects on marine mammals and their habitat, estimated amount and manner of take, and proposed mitigation, monitoring and reporting measures. NMFS received comments from a group of environmental non-governmental organizations (ENGOS) including the Natural Resources Defense Council, Conservation Law Foundation, Defenders of Wildlife, Whale and Dolphin Conservation, National

Wildlife Federation, NY4WHALES, and the Southern Environmental Law Center.

However, the comments consisted of a short cover letter with a subject line and comments referring to the issuance of an IHA for the construction of a different project (87 FR 806; January 6, 2022), and an attached set of previously submitted recommendations related to right whale mitigation for the site assessment and characterization phases and construction phases of offshore wind development more generally. That other project occupies a small portion of Ørsted's survey area for this Renewal IHA, and the relevant issued IHA would be effective during a different time from when this Renewal IHA would be effective. NMFS thus did not receive any comments relevant to the issuance of this Renewal IHA. Nevertheless, given the more general nature of some of the issues raised in the ENGOs' appended recommendations, NMFS reviewed the comments. To the extent that some of the issues may be relevant to this Renewal IHA, the pertinent comments and our responses are summarized below.

*Comment 1:* The ENGOs objected to NMFS' process to consider extending any 1-year IHA with a truncated 15-day comment period, claiming that it is contrary to the MMPA.

*Response:* NMFS' IHA renewal process meets all statutory requirements. All IHAs issued, whether an initial IHA or a Renewal IHA, are valid for a period of not more than one year. The public has at least 30 days to comment on all proposed IHAs, with a cumulative total of 45 days for IHA Renewals. As noted above, the **Request for Public Comments** section in the notice of the proposed initial IHA made clear that the agency was seeking comment on both the proposed initial IHA and the potential issuance of a renewal for this project. Because any renewal (as explained in the **Request for Public Comments** section) is limited to another year of identical or nearly identical activities in the same location (as described in the **Description of the Proposed Activity** section) or the same activities that were not completed within the 1-year period of the initial IHA,

reviewers have the information needed to effectively comment on both the immediate proposed IHA and a possible 1-year renewal, should the IHA holder choose to request one.

While there are additional documents submitted with a renewal request, for a qualifying renewal these are limited to documentation that NMFS will make available and use to verify that the activities are identical to those in the initial IHA, are nearly identical such that the changes would have either no effect on impacts to marine mammals or decrease those impacts, or are a subset of activities already analyzed and authorized but not completed under the initial IHA. NMFS will also confirm, among other things, that the activities will occur in the same location; involve the same species and stocks; provide for continuation of the same mitigation, monitoring, and reporting requirements; and that no new information has been received that would alter the prior analysis. The renewal request must also contain a preliminary monitoring report, but that is to verify that effects from the activities do not indicate impacts of a scale or nature not previously analyzed. The additional 15-day public comment period provides the public an opportunity to review these few documents, provide any additional pertinent information, and comment on whether they think the criteria for a renewal have been met. NMFS also will provide direct notice of the proposed renewal to those who commented on the initial IHA, to provide an opportunity to submit any additional comments. Between the initial 30-day comment period on these same activities and the additional 15 days, the total comment period for a renewal is 45 days.

In addition to the IHA Renewal process being consistent with all requirements under section 101(a)(5)(D), it is also consistent with Congress's intent for issuance of IHAs to the extent reflected in statements in the legislative history of the MMPA. Through the provision for renewals in the regulations, description of the process and express invitation to comment on specific potential renewals in the Request for Public

Comments section of each proposed IHA, the description of the process on NMFS' website, further elaboration on the process through responses to comments such as this, posting of substantive documents on the agency's website, and provision of 30 or 45 days for public review and comment on all proposed initial IHAs and renewals, respectively, NMFS has ensured that the public “is invited and encouraged to participate fully in the agency decision-making process.”

In prior responses to comments about IHA Renewals (*e.g.*, 84 FR 52464, October 02, 2019; 85 FR 53342, August 28, 2020; 86 FR 33664, June 25, 2021; 87 FR 806, January 6, 2022), NMFS has explained how the renewal process, as implemented, is consistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, provides additional efficiencies beyond the use of abbreviated notices, and, further, promotes NMFS’ goals of improving conservation of marine mammals and increasing efficiency in the MMPA compliance process. Therefore, we intend to continue implementing the renewal process. For more information, NMFS has published a description of the renewal process on our website (available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals>).

*Comment 2:* The ENGOs recommended that NMFS should require all project vessels to adhere to a 10-knot (18.5 km/hr) speed restriction at all times, and in all places except in limited circumstances where the best available scientific information demonstrates that whales do not occur in the area. As a mechanism for modifying this speed restriction, the ENGOs suggest that the project proponent develop and implement, in consultation with NMFS, an Adaptive Plan that is scientifically proven to be equally or more effective than a 10-knot (18.5 km/hr) speed restriction.

*Response:* Ørsted communicated to NMFS that marine site characterization vessels (both survey and supporting) travel at 10 knots or less while in transit and during

the surveys. During active surveying, speeds are generally significantly less (in the range of 3-5 knots) although this is dependent on the type of equipment and survey.

NMFS has analyzed the potential for ship strike resulting from Ørsted's activity and has determined that the mitigation measures specific to ship strike avoidance are sufficient to avoid the potential for ship strike. These include, but are not limited to the survey vessel crew members responsible for navigation duties must receive site-specific training on marine mammal sighting/reporting and vessel strike avoidance measures; the vessel operator and crew must maintain a vigilant watch for all large whale species (including the North Atlantic right whale); a requirement that all vessel operators comply with the 10 knot (18.5 km/hour) or less speed restriction while underway in any established Seasonal Management Areas (SMAs), or Dynamic Management Areas (DMAs); a requirement that all vessel operators reduce vessel speed to 10 knots (18.5 km/hour) or less when any large whale, mother/calf pairs, pods, or large assemblages of non-delphinid cetaceans are observed within 100 m of an underway vessel; a requirement that all survey vessels maintain a separation distance of at least 500 m from any sighted North Atlantic right whale; a requirement that, if underway, vessels must steer a course away from any sighted North Atlantic right whale at 10 knots (18.5 km/hr) or less until the 500-m minimum separation distance has been established; a requirement that all vessels must maintain a minimum separation distance of 100 m from sperm whales and other baleen whales; and a requirement that all vessels must, to the maximum extent practicable, attempt to maintain a minimum separation distance of 50 m from all other marine mammals, with an understanding that at times this may not be possible (*e.g.*, for animals that approach the vessel). We have determined the existing ship strike avoidance measures are sufficient to ensure the least practicable adverse impact on species or stocks and their habitat. Further, NMFS is not aware of a wind industry vessel (*e.g.*, marine site

characterization survey vessel or wind energy vessels used in European wind project construction and operation) reporting a ship strike to date.

Regarding the ENGOs' suggestion that project proponents should coordinate with NMFS to develop an Adaptive Plan for potential modification of vessel speed restrictions for future projects, NMFS will consider specific proposals for the development, quantitative evaluation, and implementation of such a Plan, should that information become available in the future.

*Comment 3:* The ENGOs recommend that NMFS prohibit site characterization surveys during times of highest risk to North Atlantic right whales, which they define as times of highest relative density of animals during foraging and migration, and times when mother-calf pairs, pregnant females, surface active groups, or aggregations of three or more whales are, or, are expected to be, present. The ENGOs suggest that these time periods should be defined based on the best available scientific information at the time of the survey activity. Finally, the ENGOs suggest that the development and scientific validation of a near real-time monitoring system and mitigation protocol for North Atlantic right whales and other large whale species could be used to dynamically manage the timing of site assessment and characterization activities to ensure that those activities are undertaken during times of lowest risk for all relevant large whales species.

*Response:* NMFS is requiring Ørsted to operate no more than three concurrent survey vessels, with HRG survey equipment operating at or below 180 kHz, from January 1 through May 31 within the Lease Areas and ECRs, not including coastal and bay waters. This seasonal restriction aligns with the timeframe during which North Atlantic right whale densities are highest in the project area, based on Roberts (2020) and Robert *et al.* (2021), which incorporated more recent survey data (through 2018) and that for the first time included data from the 2011-2015 surveys of the MA and RI/MA wind energy areas (WEAs; Kraus *et al.* 2016) as well as the 2017-2018 continuation of those



surveys, known as the Marine Mammal Surveys of the Wind Energy Areas (MMS-WEA) (Quintana *et al.*, 2018). We believe these models provide the best available scientific information to quantify temporal and spatial patterns of North Atlantic right whale occurrence in the project area. The seasonal restriction will limit the number and intensity of potential take by Level B harassment resulting from exposure to active HRG equipment (*i.e.*, boomers, sparkers, and Chirps). NMFS is also requiring Ørsted to comply with vessel speed restrictions associated with SMAs, and DMAs if any are established near the project area. Prior to and during survey operations, Ørsted must consult the NOAA Right Whale Sightings Advisory System and WhaleMap for situational awareness of recent sighting locations. Should North Atlantic right whales be observed while HRG survey equipment is active, Ørsted must abide by a mandatory 500-m shutdown zone, which is more than three times as large as the greatest distance to the Level B harassment isopleth (141 m). Finally, the ship strike avoidance and minimum separation requirements described in response to *Comment 2* further minimize the potential impacts of site characterization surveys on North Atlantic rights whales.

The ENGOs suggested that a real-time monitoring system and mitigation protocol for North Atlantic right whales would be useful to dynamically manage the timing of site characterization survey activities, although it is not clear if the suggested system and protocol is based on acoustic or visual monitoring, or both. NMFS is generally supportive of these concepts. A network of near real-time baleen whale monitoring devices are active or have been tested in portions of New England and Canadian waters. These systems employ various digital acoustic monitoring instruments that have been placed on autonomous platforms including slocum gliders, wave gliders, profiling floats and moored buoys. Systems that have proven to be successful will likely see increased use as operational tools for many whale monitoring and mitigation applications. In 2020, NMFS convened a workshop to address objectives related to monitoring North Atlantic right

whales. The NMFS publication “Technical Memorandum NMFS-OPR-64: North Atlantic Right Whale Monitoring and Surveillance: Report and Recommendations of the National Marine Fisheries Service's Expert Working Group”, available at: <https://www.fisheries.noaa.gov/resource/document/north-atlantic-right-whale-monitoring-and-surveillance-report-and-recommendations>, summarizes information from the workshop and presents the Expert Working Group's recommendations for a comprehensive monitoring strategy to guide future analyses and data collection. Among the numerous recommendations found in the report, the Expert Working Group encouraged the widespread deployment of auto-buoys to provide near real-time detections of North Atlantic right whale calls that visual survey teams can then respond to for collection of identification photographs or biological samples.

The type of dynamic monitoring system and mitigation protocol suggested by the commenters has not been proposed by any applicant, including Ørsted, when applying for an IHA to conduct the type of work analyzed here. As discussed above, the seasonal restriction (January 1 through May 31) already serves to reduce temporal and spatial overlap between Ørsted's marine site characterization surveys and times during which North Atlantic right whale occurrence is expected to be highest in the project area. In addition, NMFS cannot require project proponents to be part of a monitoring network such as the one described above until such a network of monitoring devices is available. However, NMFS will consider how to best incorporate the use of such systems in the future should such a network be developed

*Comment 4:* The ENGOs recommended that site characterization surveys should not be initiated within 1.5 hours of civil sunset or in times of low visibility when the visual clearance zone and exclusion zone cannot be visually monitored, as determined by the lead PSO.

*Response:* NMFS acknowledges the limitations inherent in detection of marine mammals at night. However, no injury is expected to result from exposure to HRG equipment, even in the absence of mitigation, given the characteristics of the sources planned for use (supported by the very small estimated Level A harassment zones; *i.e.*, < 54 m for all impulsive sources). The ENGOs do not provide any support for the apparent contention that injury is a potential outcome of these activities. Regarding Level B harassment, any potential impacts would be limited to short-term behavioral responses. The commenters establish that the status of North Atlantic right whales in particular is precarious. NMFS agrees in general with the discussion of this status provided by the commenters. Note that NMFS considers impacts from this category of survey operations to be near de minimis, with the potential for Level A harassment for any species to be discountable and the severity of Level B harassment (and, therefore, the impacts of the take event on the affected individual), if any, to be low. Commenters provide no evidence to the contrary. NMFS is also requiring Ørsted to employ a PSO during nighttime hours who must have access to night-vision equipment (*i.e.*, night-vision goggles and/or infrared technology). Given these factors, NMFS has determined that more restrictive mitigation requirements are not warranted.

Restricting surveys in the manner suggested by the commenters may reduce marine mammal exposures by some degree in the short term, but would not result in any significant reduction in either intensity or duration of noise exposure over the course of the surveys. In fact, the restrictions recommended by the commenters could result in the surveys spending increased total time on the water introducing noise into the marine environment, which may result in greater overall exposure to sound for marine mammals; thus, the commenters have not demonstrated that such a requirement would result in a net benefit. Furthermore, restricting the ability of the applicant to begin operations only during daylight hours would have the potential to result in lengthy shutdowns of the

survey equipment, which could result in the applicant failing to collect the data they have determined is necessary and, subsequently, the need to conduct additional surveys in the future. This would result in significantly increased costs incurred by the applicant. Thus, the restriction suggested by the commenters would not be practicable for the applicant to implement. In consideration of the likely effects of the activity on marine mammals absent mitigation, potential unintended consequences of the measures as proposed by the commenters, and practicability of the recommended measures for the applicant, NMFS has determined that restricting operations as recommended is not warranted or practicable in this case.

*Comment 5:* The ENGOs recommended that NMFS should require project proponents to implement visual clearance and exclusion zones of at least 500 m for all large whale species, except North Atlantic right whales, for which they recommended 1,000-m visual and acoustic clearance and exclusion zones. To monitor the acoustic zones, the ENGOs recommend utilizing near real-time passive acoustic monitoring (PAM) from a vessel other than the dedicated survey vessel, or from a stationary unit.

*Response:* NMFS disagrees with these recommendations for this Renewal IHA. Regarding the clearance and shutdown zone recommendations, we note that the 500-m exclusion zone for North Atlantic right whales exceeds the modeled distance to the Level B harassment isopleth (141 m) by a substantial margin. Given that calculated Level B harassment isopleths are likely conservative, and NMFS considers impacts from HRG survey activities to be near de minimis, a 100-m shutdown zone for other marine mammal species (including large whales and strategic stocks of small cetaceans) is sufficiently protective to effect the least practicable adverse impact on those species and stocks. Further, no injury is expected to result even in the absence of mitigation, given the characteristics of the sources planned for use (supported by the very small estimated Level A harassment zones; *i.e.*, < 36.5 m for all impulsive sources).

There are several reasons why we do not agree that use of PAM is warranted for Ørsted's 24-hour HRG surveys. While NMFS agrees that PAM can be an important tool for augmenting detection capabilities in certain circumstances, its utility in further reducing impact for Ørsted's HRG survey activities is limited. We note first using a towed passive acoustic sensor(s) to detect baleen whales (including North Atlantic right whales) is not ideal for monitoring low-frequency vocalizing baleen whales because calls are masked by ship and flow noise, and vessel presence can alter vocal behavior of the study animals (Lesage *et al.*, 1999; Thode, 2004; Norris *et al.*, 2012; Guerra *et al.*, 2014; Heinemann *et al.*, 2016).

Vessels produce low-frequency noise, primarily through propeller cavitation, with the main energy in the 5-300 Hertz (Hz) frequency range. Source levels range from approximately 140 to 195 decibels (dB) re 1 micropascal ( $\mu$ Pa) at 1 m (NRC, 2003; Hildebrand, 2009), depending on factors such as ship type, load, and speed, and ship hull and propeller design. Studies of vessel noise show that it appears to increase background noise levels in the 71-224 Hz range by 10-13 dB (Hatch *et al.*, 2012; McKenna *et al.*, 2012; Rolland *et al.*, 2012). PAM systems employ hydrophones towed in streamer cables approximately 500 m behind a vessel. Noise from water flow around the cables and from strumming of the cables themselves is also low frequency and typically masks signals in the same range (*i.e.*, most baleen whale vocalizations). Whales are routinely detected acoustically using moored systems and sonobuoys, or using autonomous gliders. However, these platforms are all quiet. Providers of observer services, including PAM, report that they have never detected a baleen whale (other than rare detections of humpback whales, which have significantly higher frequency content in their calls) using towed PAM.

Even if a right whale could be detected using towed PAM, the area expected to be ensonified above the Level B harassment threshold is relatively small ( $\leq 141$  m) and,

inasmuch as PAM will only detect a portion of any animals exposed within a zone, the overall probability of PAM detecting an animal in the harassment zone is low, supporting the limited value of PAM for use in reducing take with smaller zones. In addition, if a PAM system was deployed from a secondary vessel, that vessel will still have to travel at 4 knots to accompany the survey vessel, leading to the same limitations when using towed PAM. Finally, if a stationary PAM unit were deployed (assuming its location is within relatively close proximity to the starting position of the survey vessel), the unit would have to be equipped to localize North Atlantic right whale calls, for example, to positions within the clearance and exclusion zones (regardless of size) relative to the changing position of a transiting survey vessel. Even if localization is possible, it becomes impracticable once the vessel moves out of the detection and localization range of the stationary unit.

Many of the ENGO recommendations included acoustic monitoring of clearance and exclusion zones. Given that the effects to marine mammals from the types of surveys authorized in this IHA are expected to be limited to a small amount of low-level behavioral harassment, even in the absence of mitigation, the additional benefit anticipated for North Atlantic right whales by adding this detection method would be essentially non-existent. Given the lack of efficacy, the logistical challenges, and the cost of implementing a full-time PAM program, we have determined the current requirements for visual monitoring are sufficient to ensure the least practicable adverse impact on the affected species or stocks and their habitat. For the reasons described above, NMFS' responses to additional comments do not include references to acoustic monitoring during site characterization surveys. Please see the ENGOs' full comment letter for information regarding their general recommendations for acoustic monitoring, which can be found here: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-orsted-wind-power-north-america-llc-site-characterization>.

*Comment 6:* The ENGOs recommended that NMFS should require project proponents to 1) conduct visual monitoring of the clearance zone beginning 30 minutes prior to commencement or re-initiation of, and continuing throughout, survey activities, 2) delay survey activities if a North Atlantic right whale, or other large whale species, is detected within the relevant clearance zone, 3) shutdown survey activities upon a visual detection of any of these species within the species-specific exclusion zone and, if shutdown occurs, 4) resume or initiate survey activities only after the lead PSO confirms that no North Atlantic right whales or other large whale species have been visually detected in the relevant clearance zones for 30 minutes.

The ENGOs suggested that these measures should be implemented during site characterization activities with noise levels that could result in injury or harassment to large whales.

*Response:* No injury is expected to result from site characterization surveys, even in the absence of mitigation, given the characteristics of the sources planned for use (supported by the very small estimated Level A harassment zones; *i.e.*, < 36.5 m for all impulsive sources). The ENGOs do not provide any support for the apparent contention that injury is a potential outcome of these activities. Only take by Level B harassment is anticipated and authorized.

NMFS does agree that monitoring of a clearance zone should begin 30 minutes prior to commencement or resumption of use of HRG survey equipment that may incidentally harass marine mammals following a delay or shutdown. NMFS also agrees that visual detection of a species (including North Atlantic right whales) within its respective clearance zone during the 30-minute clearance period or exclusion zone when acoustic sources are active should trigger a delay or shutdown, respectively, of survey activities. Finally, as suggested by the ENGOs, in order for survey activities to commence or resume, the lead PSO must confirm that no North Atlantic right whale or

other baleen whale has been sighted in the clearance zone during the clearance period. Thus, these measures are required by all authorizations for take incidental to site characterization activities.

*Comment 7:* The ENGOs stated that it is their general view that NMFS must require a minimum of four PSOs on survey vessels following a two-on, two-off rotation, each responsible for scanning no more than 180° of the horizon.

*Response:* NMFS typically requires that a single PSO must be stationed at the highest vantage point and engaged in general 360-degree scanning during daylight hours. Although NMFS acknowledges that the single PSO cannot reasonably maintain observation of the entire 360-degree area around the vessel, it is reasonable to assume that the single PSO engaged in continual scanning of such a small area (*i.e.*, 500-m exclusion zone for North Atlantic right whales, which is more than three times the maximum 141-m Level B harassment zone) will be successful in detecting marine mammals that are available for observation at the surface. Further, Ørsted is required to deploy two PSOs for nighttime survey activities, during which the PSOs will have access to night vision devices.

The monitoring report for the initial IHA, as well as monitoring reports for similar marine site assessment and characterization surveys (which can be found here <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>), submitted to NMFS have demonstrated that PSOs active only during daylight operations are able to detect marine mammals and implement appropriate mitigation measures. Nevertheless, as night vision technology has continued to improve, NMFS has adapted its practice. NMFS has included a requirement in the initial IHA and this Renewal IHA that night-vision equipment (*i.e.*, night-vision goggles and/or infrared technology) must be available for use during nighttime monitoring. Under the issued Renewal IHA, survey operators are



not required to provide PSOs with infrared devices during the day but observers are not prohibited from employing them. Given that use of infrared devices for detecting marine mammals during the day has been shown to be helpful under certain conditions, NMFS will consider requiring them to be made accessible for daytime PSOs in the future, as more information becomes available regarding this technology. NMFS is also requiring that all PSOs be equipped with binoculars and have the ability to estimate distances to marine mammals located in proximity to the vessel and/or exclusion zones. We have determined that the PSO requirements in the IHA are sufficient to ensure the least practicable adverse impact on the affected species or stocks and their habitat.

*Comment 8:* The ENGOs recommended that NMFS should require operation of sub-bottom profiling systems at the lowest practicable source level for the survey objectives.

*Response:* Ørsted has selected the equipment necessary to achieve their objectives. We have evaluated the effects expected as a result of use of this equipment, made the necessary findings, and imposed mitigation requirements sufficient to achieve the least practicable adverse impact on the affected species and stocks of marine mammals. It is not within NMFS' purview to make judgments regarding what constitutes the "lowest practicable source level" for an operator's survey objectives.

*Comment 9:* The ENGOs recommended that 1) NMFS require project proponents to report observation(s) of a North Atlantic right whale(s) to NMFS or the USCG as soon as possible, but no later than the end of the PSO shift during which the observation(s) occurred, and 2) Ørsted should be required to immediately report an entangled or dead North Atlantic right whale or other large whale species to NMFS OPR, NOAA Fisheries Marine Mammal and Sea Turtle Stranding and Entanglement Hotline (866-755-6622; also the North Atlantic Right Whale Sighting Advisory System), or the USCG via available reporting systems (e.g., phone, app, radio). In addition, the ENGOs encourage

project proponents to commit to supporting and participating in future advancing/streamlining efforts for methods of reporting. Finally, the ENGOs suggest that quarterly reports of PSO sightings data should be made publicly available to inform marine mammal science and protection.

*Response:* NMFS agrees with the ENGOs' first and second recommendations, hence the inclusion of these measures in both the initial and Renewal IHAs. Regarding reporting methods, NMFS agrees with the ENGOs and supports efforts to improve methods by which a sighting of a live North Atlantic right whale, or entangled or dead North Atlantic right whale (or other large whale), is reported by a project proponent and we welcome specific proposals to do so. Finally, NMFS does not concur with the suggestion that Ørsted should submit quarterly PSO sightings data reports, and that these reports be made publicly available. Ørsted is required to submit a final report to NMFS within 90 days after completion of survey activities or expiration of this IHA, whichever comes sooner. The report must fully document the methods and monitoring protocols, summarize the data recorded during monitoring, and describe, assess, and compare the effectiveness of monitoring and mitigation measures. The ENGOs did not provide specific examples regarding how making PSO sightings data publicly available on a quarterly basis would inform marine mammal science and protection in any meaningful way on this timescale. PSO sightings data (as well as all of the additional information required in a final report) are included in PSO monitoring reports from previous marine site characterization surveys, including the PSO monitoring report from the initial IHA that NMFS is renewing, which can be found here:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable>. As noted above, Ørsted is already required to immediately report all North Atlantic right whale sightings to the NMFS North Atlantic Right Whale Sighting Advisory System (866) 755-6622) and to the U.S.

Coast Guard via channel 16, providing mariners in the area with awareness of North Atlantic right whale locations and, thus, the opportunity to proactively reduce vessel speeds. In addition, daily visual and acoustic detections of North Atlantic right whales and other large whale species along the Eastern Seaboard, as well as Slow Zone locations, are publicly available on WhaleMap (<https://whalemap.org/WhaleMap/>). Further, recent acoustic detections of North Atlantic right whales and other large whale species are available to the public on NOAA's Passive Acoustic Cetacean Map website <https://apps-nefsc.fisheries.noaa.gov/pacm/#/narw>. Given the open access to the resources described above, NMFS does not concur that public access to quarterly PSO reports is warranted and we have not included this measure in the authorization.

### **Determinations**

The survey activities proposed by Ørsted are identical to those analyzed in the initial IHA, including the planned number of days and location of activity, as are the method of taking and the effects of the action. Therefore, the amount of authorized take is equal to that authorized in the initial IHA. The mitigation measures and monitoring and reporting requirements, as described above, are identical to the initial IHA. The potential effect of Ørsted's activities remains limited to Level B harassment in the form of behavioral disturbance. In analyzing the effects of the activities in the initial IHA, NMFS determined that Ørsted's activities would have a negligible impact on the affected species or stocks and that the authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.*, less than one-third of the abundance of all stocks).

NMFS has concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. This includes consideration of Ørsted's monitoring report, the estimated abundances of five stocks (North Atlantic right whales, fin whales, minke whales, Risso's dolphins, and harbor seals) decreasing, and the estimated abundances of two stocks (common dolphins and

gray seals) increasing (Hayes *et al.*, 2021). Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable adverse impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) Ørsted's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

### **National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must evaluate our proposed action (*i.e.*, issuance of incidental harassment authorization) and alternatives with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 of the Companion Manual for NAO 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the Renewal IHA qualifies to be categorically excluded from further NEPA review.

### **Endangered Species Act**

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened

species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the NMFS Greater Atlantic Regional Fisheries Office (GARFO), whenever we propose to authorize take of endangered or threatened species.

The NMFS Office of Protected Resources is authorizing the incidental take of four species of marine mammals that are listed under the ESA: the North Atlantic right, fin, sei and sperm whale. We requested initiation of consultation under Section 7 of the ESA with NMFS GARFO on July 1, 2020, for issuance of the initial IHA. Previously, BOEM consulted with NMFS GARFO under section 7 of the ESA on commercial wind lease issuance and site assessment activities on the Atlantic Outer Continental Shelf in Massachusetts, Rhode Island, New York and New Jersey Wind Energy Areas. The NMFS GARFO issued a Biological Opinion in 2013 concluding that these activities may adversely affect but are not likely to jeopardize the continued existence of the North Atlantic right, fin, sei and sperm whale. Upon request from the NMFS Office of Protected Resources, NMFS GARFO issued a Letter of Concurrence on September 24, 2020 concluding that the initial IHA issuance fell under the scope of the 2013 Biological Opinion and that the initial IHA issuance was not likely to adversely affect ESA-listed marine mammal species. The proposed Renewal IHA provides no new information about the effects of the action, nor does it change the extent of effects of the action, or any other basis to require reinitiation of consultation with NMFS GARFO; therefore, the consultation and determinations for the initial IHA remains valid.

## **Renewal**

NMFS has issued a Renewal IHA to Ørsted for the take of marine mammals incidental to marine site characterization survey activities offshore from New York to Massachusetts in the areas of the Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS-A 0486/0517, OCS-A 0487,

and OCS-A 0500) (Lease Areas) and along potential submarine ECRs to landfall locations from New York to Massachusetts, effective from the date of issuance through September 24, 2022.

Dated: March 7, 2022.

**\Kimberly Damon-Randall,**

*Director, Office of Protected Resources,*

*National Marine Fisheries Service.*

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